(2)

No. 05-874

In the Supreme Court of the United States

LAMAR JONES BEY

Petitioner,

v

KELLY JOHNSON
AND WAYNE TRIERWEILER

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

1. The Prison Litigation Reform Act (PLRA) requires a unique judicial screening to determine whether the inmate has a likelihood of prevailing. The PLRA also mandates exhaustion of administrative remedies prior to bringing suit. Jones Bey's complaint failed to plead and show exhaustion with respect to some claims. Does the PLRA require "total exhaustion," that is, dismissal of the entire complaint without prejudice where one or more claims remain unexhausted?

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STATUTORY PROVISION INVOLVED

1. 42 USC § 1997e(c)(1) and (2) provide:

> (1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (*42 USC 1983*), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.
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> (2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

STATEMENT OF THE CASE

Petitioner Lamar Jones Bey, an African-American Michigan prison inmate, brought a lawsuit under 42 USC §1983 against Respondents, Kelly Johnson and Wayne Trierweiler (Respondents).[1] Jones Bey alleged that Johnson retaliated against him in violation of his rights under the First Amendment by denying him access to the prison exercise yard, using racial slurs, disposing of some of his religious materials, and writing false major misconduct violations against him. Jones Bey claimed that Trierweiler retaliated against him by arbitrarily denying or rejecting his grievances. Jones Bey also alleged that Johnson violated his right under the Eighth Amendment to be free from the excessive use of force.[2]

Jones Bey alleges that on October 7, 2001 Johnson did not allow him access to the prison exercise yard because he was not fully dressed when she arrived to escort him outside. Jones Bey filed a Step I (of a three step process) grievance over that incident.[3] Prison officials subsequently denied his grievance at all three steps.

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[1] Johnson was a corrections officer at the Alger Maximum Correctional Facility in Munising, MI. Trierweiler was the grievance coordinator at Alger.

[2] Jones Bey also set forth claims under Michigan law for ethnic intimidation and assault and battery. Since the District Court dismissed all of Jones Bey's federal claims, it declined to exercise supplemental jurisdiction over his state law claims, pursuant to 28 USC § 1367(c)(3). Jones Bey also requested a temporary restraining order and preliminary injunction against Johnson. The District Court denied his request for injunctive relief. He abandoned his request for injunctive relief in the Court of Appeals.

[3] The Michigan Department of Corrections Policy Directive 03.02.130 sets forth a three-step grievance process. First, a prisoner must file a grievance at the institution where the prisoner is incarcerated. If the prisoner is dissatisfied with the response he can submit an appeal to the Warden. Finally, if he is dissatisfied with that response he can file an appeal to the Director of the Michigan Department of Corrections.

Following that initial incident in October 2001 Jones Bey maintains that Johnson approached him on November 4, 2001, and threatened to have his counselor, Robert Johnson (no relation), put pressure on him to stop filing grievances. Jones Bey did file a Step I grievance regarding this issue. There is no record that Jones Bey ever pursued this grievance beyond Step I.

On November 9, 2001, Johnson allegedly searched Jones Bey's cell, left it in disarray and tore pages out of his Islamic texts. According to Jones Bey, when he confronted Johnson about the incident she responded to him using racial slurs. Jones Bey filed a Step I grievance in which he complained about the search and the racial slurs. There is no evidence that he pursued this grievance beyond Step I.

On December 13, 2001, Jones Bey again alleged in a grievance that Johnson had used racial slurs toward him. Jones Bey did exhaust this grievance through all three steps.

That same day, December 13, 2001, Johnson issued a major misconduct report against Jones Bey, charging him with assault and battery on a staff member. Johnson alleged that while she returned Jones Bey to his cell he spun his body around and pinned her hands against a slot in the cell door. Jones Bey claimed that it was Johnson who forced his hands against the slot in the door causing him "extreme pain."[4]

Jones Bey claims that on December 30, 2001, Johnson used racially offensive remarks towards him. He filed a grievance that same day. Jones Bey exhausted that grievance at all three levels.

Jones Bey filed a grievance on January 10, 2002 alleging that Johnson issued him the major misconduct violation on December

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[4] According to Michigan Department of Corrections Policy Directive 03.02.130, a prisoner cannot grieve a major misconduct report. Consequently, the appropriate procedure was for Jones Bey to contest the major misconduct violation at his hearing. On January 8, 2002, a hearing officer found Jones Bey not guilty of the assault.

13, 2001, to retaliate against him for the previous grievances he filed against her. Additionally, Jones Bey alleged that Johnson fabricated the major misconduct to conceal her inappropriate use of force. Jones Bey did exhaust his administrative remedies as to this grievance.

Also on January 10, 2002, Johnson filed a grievance against Johnson for allegedly saying to him "you're dead." Jones Bey did exhaust his administrative remedies as to this grievance.

Jones Bey then filed another grievance on January 10, 2002, against Johnson for using more racial slurs against him on December 30, 2001. He did exhaust this grievance through all three steps.

On January 20, 2002, Jones Bey alleges that Johnson put him in a segregation module in the prison yard and told him "I'm going to show you who has the power." Jones Bey filed yet another grievance against her. Jones Bey exhausted that grievance through all three steps.

On February 11, 2002, Johnson allegedly came to Jones Bey's cell and said "you're outta here." Jones Bey fully exhausted his administrative remedies as to this issue.

On February 21, 2002, Jones Bey alleges that another officer confiscated some of his legal materials on Johnson's orders. Jones Bey did exhaust all of his administrative remedies.

Finally, Jones Bey maintains that on April 21, 2002, Johnson used racial slurs against him. He did exhaust this claim through all three steps of the grievance process.

In his federal court complaint, Jones Bey claims that Trierweiler arbitrarily rejected the grievances he filed against Johnson on November 26, 2001; December 18, 2001; December 20, 2001; and January 24, 2002, and failed to follow the Department's grievance policy. Jones Bey fully exhausted his grievances against Trierweiler. Jones Bey alleged that Trieweiler

retaliated against him in violation of the First Amendment by arbitrarily rejecting his grievances that he filed against Johnson.

To summarize, Jones Bey failed to exhaust two grievances he filed against Johnson. Specifically, he failed to exhaust the claims surrounding events that occurred on November 4, 2001, where Johnson allegedly threatened to have Jones Bey's counselor put pressure on him to stop filing grievances. Jones Bey also failed to exhaust the grievances concerning the claims that occurred on November 9, 2001, where Johnson supposedly destroyed some of his religious materials and used racial slurs towards him. Those grievances involved events that were later the basis for allegations in the federal court complaint. Thus, his complaint contained both exhausted and unexhausted claims.

The Respondents filed a dispositive motion arguing that Jones Bey failed to totally exhaust his administrative remedies under the PLRA. Thus, they were entitled to a dismissal without prejudice. Alternatively, they argued they were entitled to summary judgment on the merits.

The Magistrate Judge concluded in the Report and Recommendation (R&R) that Jones Bey's complaint contained both exhausted and unexhausted claims. (Pet. App. 32a-50a). Since Jones Bey failed to totally exhaust all of his claims the Magistrate Judge recommended that the District Court dismiss the entire action without prejudice. In the alternative, the Magistrate Judge recommended that the District Court dismiss the entire action on the merits.

The District Court adopted the R&R (Pet. App. 28a – 31a). In adopting the R&R the District Court indicated that Jones Bey's "[C]omplaint is properly dismissed for failure to exhaust grievance remedies." But the District Court then went on to dismiss Jones Bey's complaint on the merits.

The Court of Appeals, in a published opinion, reversed and remanded the case to the District Court with instruction to dismiss the entire complaint without prejudice because Jones Bey failed

to exhaust all of his administrative remedies. (Pet. App. 1a-27a).[5] The Court of Appeals explicitly adopted a total exhaustion rule requiring prisoners to exhaust all of their administrative remedies prior to filing suit. The failure to do so meant that the entire action should be dismissed without prejudice.

Jones Bey petitioned for rehearing and rehearing *en banc*. The Court of Appeals denied his petition in an unpublished order. (Pet. App. 51a).[6]

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[5] *Jones Bey v Johnson*, 407 F 3d 801 (CA 6 2005).

[6] *Jones Bey v Johnson*, Case No. 03-2331, 2005 US App LEXIS 22936 (CA 6, October 12, 2005).

REASONS FOR DENYING THE PETITION

I. This Court should deny the Petition because the Court of Appeals decision pursuant to the Prison Litigation Reform Act, requiring "total exhaustion" of all administrative remedies against all parties, is consistent with the plain language of the statute and the intent of Congress.

The Respondents acknowledge that the federal courts of appeals are split on the issue of whether a prisoner must totally exhaust all of his administrative remedies against all parties or face dismissal of the entire complaint without prejudice. Currently, two Circuits (the Sixth and Tenth) have adopted a total exhaustion rule.[7] In addition, the Third Circuit implemented total exhaustion in an unpublished opinion.[8]

Two Circuits (the Second and Ninth) have adopted a partial exhaustion rule that allows prisoners to proceed on their exhausted claims while their unexhausted claims will be dismissed.[9] Two Circuits (the Fifth and Seventh) have not squarely addressed total exhaustion but indicated that an exhausted claim might proceed, even though the complaint included an unexhausted claim that is subject to dismissal.[10] The Fifth Circuit in *Johnson v Johnson* allowed exhausted claims to be litigated, while dismissing unexhausted claims. But the Court did not directly address total exhaustion, specifically noting that Defendants had not argued for implementation of total

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[7] *Jones Bey*, 407 F3d at 809; *Ross v City of Bernalillo*, 365 F3d 1181, 1190 (CA 10 2004).

[8] *Vazquez v Ragonese*, unpublished per curiam opinion, No. 05-1203, 2005 US App LEXIS 16118 (CA 3 August 4, 2005).

[9] *Ortiz v McBride*, 380 F 3d 649 (CA 2 2004).

[10] *Johnson v Johnson*, 385 F 3d 503, 523 (CA 5 2004).

exhaustion.[11] Thus, it appears total exhaustion is an open question in the Fifth Circuit.

Similarly, the Seventh Circuit in *Lewis v Washington*[12] upheld the trial court's dismissing one claim for lack of exhaustion and remanded the remaining claim to determine whether Plaintiff had exhausted that claim. But the Seventh Circuit did not explicitly address the total exhaustion concept. From the decision, which never refers to any arguments by Defendants, it appears that the district court probably dismissed the case prior to service. It appears that the Seventh Circuit was not presented with a total exhaustion argument. Thus, the Seventh Circuit has apparently not expressly accepted or rejected total exhaustion. The Eighth Circuit has taken a position somewhere in the middle whereby a prisoner is allowed to amend the complaint to include only the exhausted claims.[13]

This Court should deny the petition in this case because the Sixth Circuit's adoption of the total exhaustion rule is correct and should not be overturned.

The Sixth Circuit's decision in the present case, along with decisions of the Third and Tenth Circuits, is correct because it is consistent with the text of the statute.[14] In adopting the total exhaustion rule the United States Court of Appeals for the Sixth Circuit held, "We adopt the total exhaustion rule, in large part, because the plain language of the statute dictates such a result."[15] The PLRA specifically states that:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any

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[11] *Johnson,* 385 F 3d at 523, n 15.

[12] *Lewis v Washington,* 300 F 3d 829 (CA 7 2002).

[13] *Graves v Norris,* 218 F 3d 884 (CA 8 2000); *Kozohorsky* v *Harmon,* 332 F 3d 1141, 1144 (CA 8 2003).

[14] *Vazquez,* 2005 US App LEXIS 16118; *Ross,* 365 F 3d at 1190.

[15] *Jones Bey,* 407 F 3d at 807.

> other Federal law, by a prison confined in any jail, prison, or other Correctional facility until such administrative remedies as are available are exhausted.[16]

Thus, the plain language of the PLRA prohibits an entire action from even going forward absent total exhaustion. Congress distinguished between the term "actions" and "claims" in 42 USC § 1997e(c)(1) and (2). Congress indicated that courts "*shall* dismiss . . . any action that is frivolous, malicious or fails to state a claim."[17] The very next subsection provides that a court "*may dismiss*" a claim if it is frivolous, malicious, or fails to state a claim.[18] Congress drew a distinction between a "claim," which is an individual allegation, and an "action," which is an entire lawsuit.[19] As the Sixth Circuit noted in making the distinction between the terms "action" and "claim":

> If a district court is presented with a "mixed" petition, it has the power under subsection (c)(2) to dismiss any frivolous claim, exhausted or not, *with prejudice*. However, dismissal under subsection (a) allows the court to dismiss the entire action *without prejudice*. The *Smeltzer* court recognized that Congress must have intended that courts could use subsection (c)(2) to dismiss unexhausted claims as frivolous to keep them from "holding up" the others. *Smeltzer v Hook*, 235 F Supp 736, 744 (WD Mich 2002). In the alternative the court could dismiss the entire action without prejudice and allow the prisoner to refile only exhausted claims.[20]

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[16] 42 USC § 1997e(a).

[17] 42 USC § 1997e(c)(1) (emphasis added).

[18] 42 USC § 1997e(c)(2) (emphasis added).

[19] *Jones Bey*, 407 F 3d at 807.

[20] *Jones Bey*, 407 F 3d at 807.

A rule requiring total exhaustion is also consistent with this Court's habeas corpus jurisprudence. The Sixth Circuit drew an analogy between the rule requiring total exhaustion in the habeas corpus context[21] and the Prison Litigation Reform Act:

> Additionally, adopting the total exhaustion rule creates comity between § 1983 claims and habeas corpus claims. The Supreme Court requires total exhaustion in habeas cases to allow the state courts the first opportunity to solve prisoners' cases because they are arguably in a better position to analyze and solve the problems. See *Preiser v Rodriguez*, 411 US 475 492; 36 L Ed 2d 439; 93 S Ct 1827 (1973). The PLRA, too, was enacted to allow state prison systems the first chance to solve problems relating to prison conditions. Because both bodies of law were created for similar reasons, their exhaustion rules should be interpreted in a similar manner.[22]

Moreover, the total exhaustion rule is consistent with the overall policy of the PLRA. As this Court recognized, "[I]t is beyond doubt that Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits."[23] A total exhaustion requirement satisfies the policy objectives in the Act in several ways.

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[21] *Rose v Lundy*, 455 US 509, 519 (1982).

[22] *Jones Bey*, 407 F 3d at 807-808.

[23] *Porter v Nussle*, 534 US 516, 524 (2002).

First, the District Courts will not have to sort through each complaint to determine which claims are exhausted and which are unexhausted. A partial exhaustion rule would require courts to spend scarce judicial resources sorting through often voluminous records to determine which claims could proceed. And the legislative history of the PLRA supports the Court of Appeals' ruling here. Senator Kyl explained[24] the need for the statutory reform of mandatory exhaustion of administrative remedies by referring to a comment by then Justice Rehnquist in his dissent in *Cleavinger v Saxner*: "With less to profitably occupy their time than potential litigants on the outside, and with a justified feeling that they have much to gain and virtually nothing to lose, prisoners appear to be far more prolific litigants than other groups in the population."[25] Inmates have virtually endless time to complain about every perceived wrong, large and small. While this often results in their filing lengthy, rambling complaints, it also means that they have the time to pare it down and sue only for claims they have exhausted. And they also have the time to do it over, if the court dismisses the case due to failure to totally exhaust.

Absent total exhaustion the courts will be mired in the screening process, sorting through piles of documents, trying to determine whether the inmate exhausted his claim in all steps of the grievance process. This result would be inconsistent with the intent of the PLRA to improve the quality of the lawsuits. The PLRA was not intended to place on the courts the burden of sorting each exhausted claim out of the pile of unexhausted claims. The Court of Appeals interpretation of the statute as requiring the court to dismiss a case where even one claim in a complaint remains unexhausted is consistent with the legislative intent to place the burden on the inmate to show that the corrections officials have been given the opportunity to correct the alleged problem, before bringing the matter to court.

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[24] 141 Cong Rec S7527 (daily ed. May 25, 1995).

[25] *Cleavinger v Saxner*, 474 US 193, 211 (1985) (Rehnquist, J., dissenting) (emphasis added).

Consistent with the PLRA's legislative history, total exhaustion requires the inmate to take the time to sort it out and re-file only exhausted claims, if the complaint contains even a single unexhausted claim.

Second, the total exhaustion rule avoids piecemeal litigation.[26] If a prisoner was allowed to proceed on some claims and not others, the prisoner could subsequently bring a second lawsuit requiring the District Court to once again expend scarce judicial resources reviewing whether each and every claim in the new action to determine which claims, if any, are unexhausted. This could result in a series of lawsuits dealing with the same set of operative facts pending at different stages of discovery, and different procedural postures. Potentially different outcomes could raise consideration of complicated questions of issue and claim preclusion. Total exhaustion, in contrast, promotes judicial efficiency because it is much more likely to result in a single action dealing with all claims arising out of the same set of operative facts. And since the dismissal for failure to comply with total exhaustion is necessarily without prejudice, the inmate has the opportunity to bring the action again, pleading only exhausted claims.

Third, the total exhaustion rule has collateral effects that support the policy objectives of the statute by encouraging prisoners and prison officials to make full use of the prison grievance procedure.[27] Congress intended that prison officials, not the Federal courts, have the first opportunity to resolve a prisoner's complaints.[28] The Federal courts must be the last step, not the first step, when a prisoner has a conflict with prison officials. The total exhaustion rule maximizes the incentive for prisoners to make use of the grievance process.

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[26] *Jones Bey*, 407 F 3d at 808; *Ross*, 365 F 3d at 1190.

[27] *Jones Bey*, 407 F 3d at 807; *Ross*, 365 F 3d at 1190.

[28] *Jones Bey*, 407 F 3d at 807.

Finally, this rule would aid the Federal courts by ensuring that there was a full administrative record to review for each of the prisoner's claims.[29]

Requiring total exhaustion of all claims is not unduly punitive.[30] It is true that prisoners who do not totally exhaust all of their claims will have to re-file their complaint and pay and additional filing fee. But prisoners can still proceed *in forma pauperis*. Thus, they will not be denied an opportunity to proceed on all properly exhausted claims.

Accordingly, this Court should deny the Petition for a Writ of Certiorari.

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[29] *Jones Bey*, 407 F 3d at 807; *Ross*, 365 F 3d at 1190.

[30] *Jones Bey*, 407 F 3d at 808.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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